

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

JOHN BAXLEY, JR., et al.,

Plaintiffs,

v.

**Civ. Act. No. 3:18cv01526
(Chambers, J.)**

BETSY JIVIDEN,

Defendant.

**NOTICE OF WITHDRAWAL OF RENEWED EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION REGARDING DEFENDANT’S PREVENTION,
MANAGEMENT, AND TREATMENT OF COVID-19**

Plaintiffs John Baxley, Jr., *et al.*, on behalf of themselves and the certified class, by counsel, Lydia Milnes, Jennifer S. Wagner, and Bren J. Pomponio, pursuant to the Court’s Order dated December 10, 2021, [ECF Doc. # 503], hereby notice their withdrawal of the pending Renewed Emergency Motion for Preliminary Injunction Regarding Defendant’s Prevention, Management, and Treatment of COVID-19 (“Renewed Mot. for P.I.”), without prejudice. In further explanation of their Notice of Withdrawal of the Renewed Mot. for P.I., Plaintiffs state as follows:

1. Plaintiffs filed their Renewed Mot. for P.I. on October 12, 2021. The Motion was filed in light of “striking deficiencies found during [Plaintiffs’ expert] Dr. Homer Venters’s inspections of Defendant’s facilities on September 27 through 29, 2021.” (Renewed Mot. For P.I. at 1 [ECF Doc. # 451].) Among the most serious deficiencies discovered by Dr. Venters were Defendant’s failures of policy and enforcement of existing policy in three areas: (1) Medical Isolation; (2) Quarantine; and (3) Testing. (*Id.* at 6-7.)

2. The Court thereafter set a hearing on the Renewed Mot. for P.I. for November 3, 2021. In advance of the hearing, Plaintiffs undertook significant efforts to prepare for the hearing,

including substantial investigation of current conditions, arranging for witness testimony, and preparing evidence to present to the Court regarding Defendant's deficiencies in Defendant's policies and enforcement of existing policy regarding the prevention and treatment of COVID-19 in Defendant's facilities.

3. In apparent recognition of the damaging evidence Plaintiffs had amassed in support of the Renewed Mot. for P.I., Defendant authorized her counsel to negotiate a resolution of the Motion minutes before the scheduled hearing on November 3, 2021. As a result of these negotiations, Defendant unilaterally implemented a new protocol, incorporating a majority of the proposals offered during settlement discussions on November 3, 2021. (Plfs.' Ex. 5 [ECF Doc. 502-5].)

4. Due to Defendant's successful delay tactics, the evidence amassed in support of the Renewed Mot. for P.I. is now stale. Accordingly, Plaintiffs will not be able to support their Motion with current evidence until such time as Plaintiffs' expert is permitted to conduct another inspection and observe the facilities in light of Defendant's new protocol.¹ Accordingly, the Plaintiffs have withdrawn their Renewed Mot. for P.I., but reserve the right to file a second renewed emergency motion for preliminary injunction after an inspection of the facilities, should such inspection demonstrate the need for a renewed motion.

WHEREFORE, Plaintiffs respectfully request that the Renewed Mot. for P.I. be withdrawn, without prejudice.

Respectfully submitted,
JOHN BAXLEY, JR., et al.,
By Counsel:

¹ Plaintiffs also anticipate Defendant will oppose an additional inspection by Plaintiffs' expert, and the discovery dispute would present additional delay.

/s/ Bren J. Pomponio
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